Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATHANIEL SALERY
TERRY MITCHELL
MARY MORROW
and
OSCAR ANDREWS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANK A. RUBINO
2601 South Bayshore Drive
Suite 1400
Miami, Florida 33133
(305) 858-5300

JON MAY
Counsel of Record
200 East Broward Boulevard
Suite 1210
Fort Lauderdale, Florida 33301
(954) 761-7201

Attorneys for Petitioners

150568

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

48 pp

QUESTION PRESENTED

Whether this Court should grant review in order to re-establish the role of the judiciary in insuring that electronic surveillance not become an instrument of a police state.

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Nathaniel Salery, Terry Mitchell, Mary Morrow and Oscar Andrews, *Petitioners* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit in Case No. 95-6423 is not reported. (App. A). The recommendation of the magistrate judge on the Petitioners' motion to suppress before the District Court is not reported. (App. B).

STATEMENT OF JURISDICTION

The Eleventh Circuit entered judgment in Case No. 95-6423 on August 7, 1998. (App. A). Rehearing and Rehearing En Banc was denied on October 14, 1998. (App. C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution: Amendment IV
(U.S.C.A. Const. Amend IV)

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Title 18 U.S.C. § 2518(1)(c) provides that each application for wiretap authorization shall include:

> [A] full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed, if tried, or to be too dangerous.

Title 18 U.S.C. § 2518(3)(c) provides that in issuing a wiretap authorization order, the District Court must determine whether:

> [N]ormal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

STATEMENT OF THE CASE

An unpublished opinion, though of no precedential value, may nevertheless reflect judicial practices so inimical to the Constitution and so adverse to the preservation of civil liberties, that review by this Court is of great public importance. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In this case, Petitioners seek review of an unpublished opinion of the Eleventh Circuit Court of Appeals, an opinion which reflects a nationwide trend by the lower courts to uphold orders for electronic surveillance based solely upon *an assertion* of necessity contained in the Title III application rather than an *actual demonstration* of necessity.

When the ability of the executive to conduct widespread wiretapping was limited, such judicial deference to the executive was of little threat to civil liberties. In the near future, however, law enforcement may have the ability to simultaneously intercept conversations over 100,000 telephone

lines. Case law that appeared to be a mere scratch on the body of the Fourth Amendment, now looms as a severed artery threatening the very heart of our Constitutional right to be free from unreasonable searches and seizures. Having addressed issues which arose in the context of an analog universe, the federal judiciary may wake up to find itself impotent to protect the nation from a government whose powers of surveillance almost overnight reached Orwellian proportions.

A. Course of Proceedings and Disposition in Court Below

Petitioners Mary Morrow, Oscar Andrews, Terry Mitchell, and Nathaniel Salery, were indicted in a multi-count indictment for various violations of the federal narcotics laws. Petitioners filed numerous pretrial motions, including motions to suppress all evidence discovered as a consequence of the interception of telephonic communications. A magistrate judge conducted evidentiary hearings on the motions to suppress and recommended that they be denied. After conducting an independent review, the district court agreed with the magistrate judge's reports and denied the motions to suppress.

The trial of Petitioners Andrews, Mitchell, and Salery commenced on November 7, 1994. On November 17, 1994, guilty verdicts were returned against each of the Defendants. The trial of Petitioner Morrow commenced on January 9, 1995, and culminated on January 14, 1995, with guilty verdicts. All Petitioners were given substantial sentences of incarceration in federal penitentiaries.

B. Statement of Facts Relevant to this Petition

The instant case was the culmination of a joint state and federal investigation of a drug distribution organization allegedly operated by Oscar Andrews. The Government claimed

that this organization was transporting and then distributing cocaine from Miami, Florida into the Montgomery, Alabama area. The investigation resulted in the arrest of numerous individuals who entered guilty pleas and testified on behalf of the government at trial. The testimony of these individuals was supported by wiretap evidence introduced at the trial.

Prior to trial, the defense sought the suppression of any evidence that was the fruit of court ordered electronic surveillance. At an evidentiary hearing on the defendants' motion, the defense presented testimony that the government misled the magistrate as to the availability and success of traditional investigative techniques. That evidence was as follows:

On December 3, 1993 the United States applied for and received permission to intercept telephone calls made from telephone number (205) 215-8950 at 11487 Atlanta Highway, Montgomery, Alabama, a residence owned by the Defendant Oscar Andrews. Pursuant to the court's order, the United States intercepted hundreds of hours of telephone calls involving numerous individuals, some of whom were defendants below.

Thereafter, on January 4, 1994, the United States sought and received authorization to intercepted telephone conversations on telephone number (205) 215-1187 at 11487 Atlanta Highway, Montgomery, Alabama, a residence owned by the Defendant Oscar Andrews. Hundreds of hours of conversations were intercepted pursuant to that order as well.

Finally, on February 8, 1994, the United States sought and received authorization to intercept telephone calls made from and to telephone number (205) 966-2612 subscribed to by Defendant Mary Mitchell at Route 1, Box 152, Castleberry, Alabama.

Both the January 4 and February 8, 1994 applications were based upon information previously provided the court in the December 3, 1993 application, as well as interceptions made as a result of the court's December 3, 1993 Order.

In the affidavit in support of the order for electronic surveillance the government alleged that:

> Normal investigative techniques and procedures have been tried, have not been successful, and reasonably appear unlikely to succeed if tried under the circumstances of this particular investigation.

Para. 5(d).

In the affidavit in support of the warrant, Agent Simmons detailed the information provided by various informants then asserted that each of these individuals was in fear of their lives. The clear implication of this assertion was that these persons were to afraid to testify. In fact, that was not the case.

T1 was a personal friend of Andrews who had grown up with him. T1 was a criminal but was not working off any charges at the time that he began providing information about Oscar Andrews. T1 was of proven reliability and had provided information up to three months prior to when Simmons prepared his affidavit. Most importantly T1 was willing to come to court if necessary. (R18: 189-191).[1]

T2 had claimed to have purchased 5 kilograms from Andrews directly, and was cooperating pursuant to a formal cooperation agreement. He too was willing to come to court. (R18: 191).

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1. All references in this petition are to the record on appeal before the Eleventh Circuit.

T3, another criminal, said that he had known Andrews for two years, and said that Andrews distributed 50 kilograms of cocaine per month through Robert Franklin. Like T1 and T2, T3 was available to testify. (R18: 193).

T4 was a criminal and had pending charges. Like, T1, T2, and T3 he was available to testify. (R18: 195).

Like T1, T2, T3, and T4, T5 was a criminal who was willing to testify. He too was facing criminal charges and was cooperating pursuant to a formal agreement. (R18: 196).

Although T6 claimed that he was in fear of his life, according to Simmons, he too was willing to testify. (R18: 195).

T7 was not a criminal, had not made any agreement with the government, but was still willing to come forward and testify. (R18: 199-200).

T8 was a criminal, had pending charges, was cooperating pursuant to an agreement, and was willing to testify. (R18: 200).

Informant D also had pending charges, also said that he was afraid, but would have testified anyway. (R18: 205).

Nowhere in the government's affidavit or application did the government disclose that these informants, the very persons who were providing most of the probable cause for the warrant (as well as the substance of the evidence used to obtain the indictment), were willing and available to testify. In Simmon's words, "No, it's not mentioned in here about any testimony." (R18: 199). Indeed, as discussed above, the court would have been led to the very opposite conclusion by the government's assertion that they were in fear of their lives. To the extent that some of these persons had expressed such a fear, it was

misleading to suggest and erroneous for the court to conclude, from such expressions that these persons were not available to testify at trial.

The availability of these witnesses was not the only significant fact left out of the government's presentation to the magistrate. Agent Simmons identified 19 other persons who were providing information to the government whose cooperation and information were not mentioned at all. These were identified at the hearing as CI's 1 (R18: 209), 2 (R18: 209), 3 (R18: 210), 4 (R18: 211), 5 (R18: 212), 6 (R18: 213), 8 (R18: 215), 9 (R18: 216), 10 (R18: 217), 15 (R18: 222), 19 (R18: 225), 20 (R18: 226), 21 (R18: 228), 23 (R18: 228), 24 (R18: 228), 25 (R18: 229), 27 (R18: 231), 30 (R19: 265) and 32 (R19: 267).

In the latter part of 1993, the government was using informants to make direct cocaine purchases from several of the defendants. Plainly, these purchases constituted new information. But they also constituted some of the most direct and devastating evidence available in any prosecution. Thus, contrary to the representations made by the government, the government was obtaining significant evidence as to:

a. Distribution of cocaine by Lorenzo Hughes in October and November of 1993. (R19: 287, 288, 290).

b. Information from a new informant in July of 1993 regarding Andrews and Artis. This informant claimed to have seen Artis open a kilo of cocaine and to have gone with Artis to Andrews house where they purchased three kilos of cocaine form Cecil Rhodes. (R19: 292).

c. On January 14 an informant told the government that Curtis Drayton and Lorenzo Hughes had received cocaine

valued at $750,000. This was new information obtained after July. (R19: 299).

In sum, Simmons admitted that as many as nine persons provided new information after July 1993. (R19: 300).

Other omissions made by Simmons include:

a. In his affidavit, Agent Simmons represented to the court that searches of refuse at businesses and residences did not produce items of evidentiary value. In reality, they did, netting the government many items of evidentiary value including plane tickets, hotel receipts, telephone numbers and handwritten notes. (R18: 175). Agent Simmons denied, however, that he misled the court. (R18: 176).

b. In his affidavit, Agent Simmons represented to the court that it was difficult to surveil the residence of the lead defendant, Oscar Andrews, 11487 Atlanta Highway. In fact, that residence had been subjected to video surveillance for a period of some six months, a fact omitted from mention in his affidavit and in the government's application. Indeed during that six month period the government amassed 180 videos. (R18: 185-186). Although Simmons claimed that these videos were of little evidentiary value, he admitted that they may have captured all that there was to see. (R18: 188).

Finally Simmons omitted to mention the fact that there were other mail covers used besides the one mentioned for Andrews at his residence at 128 Capri and that these mail covers had been successfully used to identify other suspect in the alleged conspiracy. (R19: 302).

In the affidavit and application, Simmons claimed that they had not been able to arrange to make drug purchases from the

upper echelon of the Oscar Andrews Organization. (R19: 303). He defined the upper echelon as the persons who dealt directly from Andrews. (R19: 305).

Nevertheless, he conceded that in fact the government had been able to make purchases, albeit small ones, from Curtis Drayton, Lorenzo Hughes, and Nathaniel Salery. These purchases were made through informants, a normal and traditional investigative technique. (R19: 305-307).

Most importantly, these purchases were monitored and the informants wired, another fact that the government failed to mention to the magistrate. Indeed, there were at least 31 occasions where the informants had contact with the defendants where they were wired. (R19: 328-330).

In reviewing the denial of the Petitioners' various motions to suppress, the Eleventh Circuit held that despite Petitioners' argument that "informants [were] available to testify (they were in this case), controlled buys [were] made, and other evidence [was] available concerning the organization and its members . . ." (App. A, 4a). "[A] wiretap may be authorized even if conventional methods have been partially successful in detecting the crime . . ." (App. A, 5a). In this case because

> the Magistrate judge made a specific finding the affidavits submitted in support of the application for interception of wire and oral communications fully informed the court as to the reasons why an electronic interception was required for a complete investigation of the conspiracy and continuing criminal enterprise . . .

the Eleventh Circuit found, "no error in the district court's admission of the evidence obtained in the wiretaps at trial." (App. A, 5a).

The Eleventh Circuit did not address Petitioners' contention that the lower court had been misled as to the true facts when it considered the application for the Electronic Surveillance.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW IN ORDER TO RESTORE THE ROLE OF THE JUDICIARY IN INSURING THAT ELECTRONIC SURVEILLANCE NOT BECOME AN INSTRUMENT OF A POLICE STATE

In *Burger v. State of New York*, 388 U.S. 41 (1967), this Court recognized that "Few threats to liberty exists which are greater than that posed by the use of eavesdropping devices." 388 U.S. 63.

In this Petition, we seek review of a decision of the Eleventh Circuit which in effect undermines the statutory scheme enacted by Congress to insure that electronic surveillance not become an instrument of a police state.

In a broader sense we seek review of various decisions of the Circuit Court which have abdicated their responsibility of insuring that wiretapping be resorted to only when genuinely necessary.

The basic protection contained within Title III is the requirement that electronic surveillance not be resorted to in instances where other investigative techniques are available. In this case, Petitioners argued that the issuing court's order was tainted by the government's failure to reveal the true extent of its success with various techniques and its efforts to mislead the court as to the unavailability of various witnesses. That argument was ignored on the court's opinion.

The Eleventh Circuit's failure to address one of Petitioners' arguments is plainly not an issue worthy of this Court's consideration.

Nor is the appellate court's deference to the findings of fact made by the District Court.

What is important is the practice of the lower courts, as reflected in this decision, of accepting assertions of necessity contained in a Title III application over contrary testimony introduced in subsequent adversarial proceedings. Essentially, the courts have become increasingly willing to uphold orders for electronic surveillance based upon the sufficiency of the statement of necessity rather than on the genuineness of necessity.

In Title III, the United States Congress enacted specific provisions authorizing wiretaps, but only under well defined and controlled circumstances. Of the various safeguards contained within that law are provisions designed to insure that wiretapping not be employed as a routine investigative technique, but rather only in cases where traditional methods had not or were not likely to succeed.

Title 18 U.S.C. § 2518(l)(c) provides that each application for wiretap authorization shall include:

> [A] full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed, if tried, or to be too dangerous.

Title 18 U.S.C. § 2518(3)(c) provides that in issuing a wiretap authorization order, the District Court must determine whether:

> [N]ormal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

In *Dalia v. United States*, 441 U.S. 238, 250 (1979) this Court stated that:

> The plain effect of the detailed restrictions of § 2518 is to guarantee that wiretapping or bugging occurs only when there is a genuine need for it, and only to the extent that it is needed.

In *United States v. Kahn*, 415 U.S. 143, 154 (1974), this Court observed that § 2518(c) was

> Designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.

The importance of complying with this requirement is revealed by the decision of this Court in *United States v. Giordano*, 416 U.S. 505 (1974). In *Giordano* this Court was asked to decide whether the failure to comply with 18 U.S.C. § 2516(1) (requiring that the Attorney General or an Assistant Attorney General, specially designated by the Attorney General approve a wiretap application) requires the suppression of evidence. In *Giordano*, an application to intercept communications of individuals suspected of narcotics trafficking had asserted that the application had been authorized by a particular Assistant Attorney General. Subsequently, during suppression hearings, it developed that no Assistant

Attorney General authorized by the Attorney General to approve such applications had, in fact, reviewed the wiretap application. In holding that the failure to obtain specific authorization by the Attorney General or a designated Assistant Attorney General required suppression, this Court observed that Title III:

> Not only limits the crimes for which intercept authority may be obtained, but also imposes important preconditions to obtaining any intercept authority at all.

416 U.S. 515.

According to this Court, a review of the legislative history demonstrates that Congress,

> Evince[d] the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communication.

Id. That wire tapping is limited to only those instances where "normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried, or to be too dangerous," is the statutory mechanism by which Congress sought to restrict the use of wiretapping to those instances where it was truly needed. 416 U.S. 515-516.

The judiciary's ability to exercise any restraint on electronic surveillance is being severely degraded by the government's ongoing efforts to eliminate any technical limitations on its ability to conduct widespread electronic surveillance. Under the 1994 Communications Assistance for Law Enforcement Act (CALEA), telephone carriers were

required to alter their networks to permit wiretapping of digital lines. That legislation did not, however, specify the scope of the surveillance to be permitted as a result of this modification. Since that time, the FBI has sought to use CALEA to force carriers to make modifications that would allow the government to tap thousands of phone calls simultaneously in a small area. "FCC Extends Wiretap Deadline," *Wired News Report*, 14.Sept. 98. Government efforts to expand surveillance culminated in the last minute insertion of additional authority in the Intelligence Authorization Act of 1998 (HR3694) (Public Law No. 105-272, signed by the President, October 20, 1998). This law now permits the government to tap telephones near targeted individuals rather than obtaining authorization for a specific phone. This very provision had been rejected by Congress as part of the 1996 Anti-Terrorism Bill. "FBI's Wish is Granted," *Wired News Report*, 9.Oct.98.

Clearly, the role of the courts in insuring that Electronic Surveillance will be limited is under attack. And that effort has been aided by the judiciary willingness to abdicate it responsibilities as well.

Recently, in *United States v. Aviles*, 153 F.3d 931 (9th Cir. 1998) the Ninth Circuit considered whether a misstatement and omission of information from a wiretap application was sufficiently material to require reversal. Although finding that this was a close question, the Ninth Circuit upheld the warrant. In so holding the Ninth Circuit observed that district courts annually approve approximately 500 applications for wiretaps and that applications are rarely denied. Consequently, the court did not believe that the district court would have refused the application even had it been properly and adequately informed. *Id.* at 937.

The Ninth Circuit seemed most persuaded by the fact that there were so few wiretap applications. The court found this "strongly suggests that the statute is effective in restraining telephone tapping by federal law enforcement agencies." *Id.*

What the Ninth Circuit is really saying here is that judicial scrutiny of wiretapping is not needed to insure that wiretapping is limited, because the numbers of applications is already so small. Assuming that for technical or practical reasons 500 is the most number of telephones that the government could tap in a year, that figure is set to change radically with the installation of digital equipment which will give the FBI the ability to tap into 100,000 conversations simultaneously. Thus to the extent that the courts sought to dodge their role in policing electronic surveillance, that can no longer be done.

A more insidious implication of the *Aviles* case is the observation that even if the district court had been provided the information that had been omitted, even if the court had not been misled, the fact that applications are rarely denied indicates that it would not have been denied in that instance.

If that is the case, applications are being approved with such frequency, not because the government has been scrupulous in following the law, but because the court's have abdicated their responsibility in insuring that the government follow the law.

A district court must suppress evidence seized pursuant to a wiretap if the defendant can show the wiretap application contained intentionally or recklessly false information that was material to the finding of probable cause. *See United States v. Meling*, 47 F.3d 1546 (9th Cir. 1995); *United States v. Leon*, 468 U.S. 897 (1984). That principle must also apply to the necessity showing required by § 2518(c)(3) or that provision

will become nothing more than an exercise in creative writing. *United States v. Carneiro*, 861 F.2d 1171, 1180-83 (9th Cir. 1988).

But no such scrutiny is possible if, as in the instant case, the courts are unwilling to address evidence of falsity or in the *Aviles* case, unconcerned with the treat that such falsehood and omissions pose to our civil liberties.

The most common formulation of the inquiry required by § 2518(c)(3), is that found in *United States v. Miller*, 116 F.3d 641 (2nd Cir. 1997):

> [T]he purpose of the statutory requirement is not to preclude resort to electronic surveillance until after all other possible means of investigation have been exhausted by investigative agents; rather they only require that the agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods.

116 F.3d 663, quoting *United States v. Vazquez*, 605 F.2d 1269, 1282 (2nd Cir.), *cert. denied*, 444 U.S. 924 (1974).

While it is undeniably true that the necessity requirement of § 2581(c)(3) was not intended to require the exhaustion of all possible techniques before resort to wiretapping. *United States v. Edwards*, 69 F.3d 419, 429 (10th Cir. 1995), it does not follow that the court's role is only to be informed "of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods." Nothing in the legislative history of Title III is there any indication that Congress expected the court's to be a rubber stamp and certainly any such inclination is prohibited by the Fourth Amendment.

That the central focus of this inquiry has been on the form of the application and not the substances is demonstrated by the next sentence in *Miller*:

> In reviewing a ruling on a motion to suppress wiretap evidence, we accord deference to the district court because
>
> > [t]he role of an appeals court in reviewing the issuance of a wiretap order . . . is not to make a *de novo* determination of sufficiency as if it were a district judge, but to decide if the facts set forth in the application were minimally adequate to support the determination that was made.

Id.

The view of the Second Circuit of its role in this process is in conflict with that of the Tenth Circuit. According to the Tenth Circuit, "the application of the 'necessity' requirement is a question subject to de novo review," and consequently the appellate court owes no deference to either the judge who issued the warrant or the judge who later considered a motion to suppress. *United States v. Castillo-Garcia*, 117 F.3d 1179, 1185 (10th Cir. 1997).

In the instant case, an examination of the testimony of Special Agent W. Marshall Simmons demonstrates that the Government had been very successful in its investigation of the instant conspiracy, and that resort to wiretapping was completely unnecessary and unlawful under the statute.

But more importantly, that testimony reveals the government's willingness to mislead the court in an effort to obtain authorization to use the most intrusive means available to spy on our citizenry.

There may be no more important question facing the courts than that presented herein. If the government pays no penalty for misleading the court, the judiciary becomes nothing more than an instrument of executive policy. If laws are satisfied by the mere invocation of words, irrespective of whether those words are true, there is no law. If electronic surveillance is to be limited to cases of genuine necessity, then it is essential that this Court revisit the necessity requirement. Otherwise, case law that proved adequate to prevent illegal surveillance during the infancy of the computer revolution will be turned into the very means by which the government will be able to justify unwarranted invasions of personal privacy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JON MAY
Counsel of Record
200 East Broward Boulevard
Suite 1210
Fort Lauderdale, Florida 33301
(954) 761-7201

FRANK A. RUBINO
2601 South Bayshore Drive
Suite 1400
Miami, Florida 33133
(305) 858-5300

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS IN *UNITED STATES OF AMERICA v. MARY MORROW, FRANK SOWERS, et al.* DATED AND FILED AUGUST 7, 1998

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6423

D. C. Docket No. CR-94-62-N

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARY MORROW, FRANK SOWERS, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama

(August 7, 1998)

Before DUBINA and MARCUS, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

Appendix A

I.

This appeal involves a large cocaine conspiracy. Defendants Mary Morrow, Oscar Andrews, Curtis Bell, Curtis Drayton, Robert Lee Franklin, Lorenzo Hughes, Robert Lander, Donald Minefield, Terry Mitchell, Nathaniel Salery, Frank Sowers, and Jerry Lindsey Artis were indicted in a multi-count indictment for various violations of federal law. The Defendants filed numerous pretrial motions, including motions to suppress all evidence discovered as a consequence of the interception of telephonic communications. Additionally, Andrews filed a motion to suppress evidence seized in searches conducted at 6904 NW 169th Street and 18200 Mediterranean Boulevard in Miami, Florida. A magistrate judge conducted evidentiary hearings on the motions to suppress and recommended that they be denied. After conducting an independent review, the district court agreed with the magistrate judge's reports and denied the motions to suppress.

The trial of Defendants Andrews, Bell, Drayton, Franklin, Hughes, Lander, Mitchell, Salery and Sowers commenced on November 7, 1994. On November 17, 1994, guilty verdicts were returned against each of the Defendants. The trial of Defendants Morrow, Artis, and Minefield commenced on January 9, 1995, and culminated on January 14, 1995, with guilty verdicts returned as to each of these Defendants. All Defendants were given substantial sentences of incarceration in federal penitentiaries.

II.

The following are the issues presented for appellate review:

(1) Whether the district court properly denied the Defendants' joint motion to suppress the evidence obtained as a result of a court ordered telephone interception of conversations between several of the Defendants.

(2) Whether the district court properly denied Lander and Bell's motion to sever their trial from the trial of the other defendants.

(3) Whether the district court properly denied Andrews' motion to suppress the evidence obtained during the search of his residence at 6904 NW 169th Street and 18200 Mediterranean Boulevard in Dade County, Florida.

(4) Whether the evidence was sufficient to sustain the convictions of each of the Defendants.

(5) Whether the district court properly sentenced the Defendants under the sentencing guidelines.

III.

"When reviewing a ruling on a motion to suppress, we review the district court's factual findings for clear error and its application of law to the facts *de novo*." *United States v. Blackman*, 66 F.3d 1572, 1577 (11th Cir. 1995), *cert. denied*, 517 U.S. 1126 (1996).

"The decision whether to grant a severance is committed to the sound discretion of the trial court and can only be overturned for an abuse of discretion." *United States v. Cross*, 928 F.2d 1030, 1037 (11th Cir. 1991) .

Sufficiency of the evidence claims are reviewed *de novo*, viewing the evidence in a light most favorable to the government. *United States v. Kammer*, 1 F.3d 1161, 1164 (11th Cir. 1993). All reasonable inferences and credibility choices should be made in the government's favor. *United States v. Keller*, 916 F.2d 628, 632 (11th Cir. 1990).

Appendix A

Whether a particular guideline applies to a given set of facts is a question of law subject to *de novo* review. *United States v. Dukovich,* 11 F.3d 140, 141 (11th Cir. 1994). Of course, factual findings made by the district court at sentencing are reviewed under the clearly erroneous standard. *Id.*

IV.

A. *Wiretaps*

The Defendants contend that the government's interception of the telephonic communications under court order was unlawful because normal investigative procedures had been successfully employed to expose the criminal conspiracy alleged in the indictment. More specifically, they argue that if informants are available to testify (they were in this case), controlled buys are made, and other evidence is available concerning the organization and its members, then electronic surveillance is not necessary and should not be authorized. We disagree.

Title 18 U.S.C. § 2518(l)(c) contains a requirement of necessity. Under that requirement, the application must include

> a full and complete statement as to whether or not other investigative procedures have been tried and failed and why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

18 U.S.C. § 2518(l)(c).

The purpose of § 2518(1)(c)'s necessity requirement is to inform the issuing authority of the difficulties involved in the

use of conventional investigative techniques and to ensure that electronic surveillance is not used where traditional investigative methods would be sufficient to expose the crime. Section 2518(i)(c) does not bar the use of electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted. *United States v. Nixon*, 918 F.2d 895, 901 (11th Cir. 1990). Indeed, a wiretap may be authorized even if conventional methods have been partially successful in detecting the crime. *United States v. Maxwell*, 25 F.3d 1389, 1394 (8th Cir. 1994).

The record in this case demonstrates that a magistrate judge thoroughly considered the Defendants' contentions regarding the use of the wiretap and addressed them in a detailed report and recommendation. The magistrate judge made a specific finding that the affidavits submitted in support of the application for interception of wire and oral communications fully informed the court as to the reasons why an electronic interception was required for a complete investigation of the conspiracy and continuing criminal enterprise. Accordingly, we see no error in the district court's admission of the evidence obtained in the wiretaps at trial. We also reject the Defendants' argument that information derived from use of a clone pager was used in support of the application for the wiretap, and therefore, that the wiretap was illegal because it was a fruit of the poisonous tree.

B. *Severance*

Defendants Bell and Lander complain that their trial should have been severed from the remaining Defendants because the spillover effect from the evidence against the other Defendants tainted the limited evidence against them. The law is clear that

criminal defendants are not entitled to a severance merely because they have a better chance of acquittal at separate trials. *Zafiro v. United States*, 506 U.S. 534, 540 (1993). Joint trials inherently create a degree of prejudice; however, the burden is on the defendant to show "compelling prejudice" before the court grants a severance. *United States v. Morales*, 868 F.2d 1562, 1571 (11th Cir. 1989). In fact, in every case where a motion for severance is made, the district court must "balance the prejudice that a defendant may suffer from a joint trial [] against the public's interest in judicial economy and efficiency." *United States v. Cross*, 928 F.2d 1030, 1037 (11th Cir. 1991). Our review of the record shows that neither Bell nor Lander suffered "compelling prejudice" in being tried with the remaining Defendants.

C. *Suppression Motions*

Defendant Andrews contests the admissibility of the evidence seized during the searches of his residences in Miami, Florida. A magistrate judge conducted an evidentiary hearing on these motions and found that the searches were legal and based on probable cause. The district court agreed with the magistrate judge's findings and denied Andrews' motions to suppress. We agree with the magistrate judge's detailed findings and see no merit to Andrews' contentions.

D. *Sufficiency of the Evidence*

All Defendants, except Mary Morrow, contend that the evidence was insufficient to support their convictions. We disagree. After reading the entire record in this case, as well as reading the parties' briefs, and having the benefit of oral argument, we are persuaded that the evidence was more than

sufficient to support each of the defendants' convictions. Indeed, the evidence presented at trial demonstrated conclusively that Andrews headed a major drug organization. Andrews controlled the source of cocaine in Miami, Florida, and arranged by various means to transport it to Alabama. After the cocaine arrived in Alabama, Andrews sold it to hand-picked members of his organization, who in turn were responsible for distributing multi-kilogram quantities to the people who worked for them. The organization and the methods used to transport cocaine changed from time to time, but essentially the same key players filled leadership positions in the organization. Those leadership positions were held by the Defendants in this case.

In addition to the wiretap evidence, the government introduced testimony from numerous witnesses who purchased cocaine from one or more of the defendants and who testified as to the nature of the conspiracy. In sum, the evidence overwhelmingly supported the conviction of each of the Defendants.

E. *Firearms*

Robert Franklin and Lorenzo Hughes also challenge their convictions for using and carrying firearms during and in relation to a drug trafficking offense. This issue is controlled by *Bailey v. United States*, 516 U.S. 137 (1995), and *United States v. Chirinos*, 112 F.3d 1089 (11th Cir. 1997), *cert. denied, Martinez v. U.S.*, 118 S. Ct. 701 (1998). In *Bailey*, the Supreme Court held that possession of a firearm without some active employment of it during a drug trafficking offense was insufficient to base a conviction under the "use" prong of 18 U.S.C. § 924(c)(1). *Bailey*, 516 U.S. 137, 148. For a conviction under the "carry" prong of § 924(c)(1), actual transport of a

firearm during a drug trafficking offense must be shown. *Chirinos*, 112 F.3d at 1095.

The government concedes in its brief that the firearms recovered at the apartment rented by Lorenzo Hughes were not being actively employed in a drug trafficking offense. The government also concedes that the evidence was not sufficient to support the "carry" prong under *Chirinos*. There is no showing that Hughes carried the firearm on his person or carried the firearm in a vehicle used for drug distribution during and in relation to a drug trafficking offense. Accordingly, we must vacate Hughes' conviction and sentence on the § 924(c)(1) count.

We reject Franklin's arguments, however, because the record demonstrates that at the time of his arrest, he had three firearms in his residence as well as over $30,000 in cash from drug proceeds. It is clear that Franklin kept his weapons in his house for his own protection and for the protection of ill-gotten gains derived from the conspiracy to sell cocaine. As the law enforcement officers entered his house, Franklin was found trying to get to one of his firearms on a shelf in his closet. This conduct supports a *Bailey* conviction.

F. *Sentencing*

Finally, all Defendants, except Drayton and Franklin, contest their sentences and the sentence computations. We have reviewed each defendants' presentence investigation report ("PSI"), as well as the sentencing transcripts with the exception of vacating Hughes' sentence on the § 924(c)(1) count, we summarily affirm the sentences of the remaining defendants.[1]

1. *See* 11th Cir. R.36-1.

Appendix A

V.

In conclusion, with the exception of Hughes' conviction and sentence under § 924(c)(1), we affirm the Defendants' convictions and sentences in all respects. We vacate Hughes' § 924(c)(1) conviction and sentence and remand this case to the district court for resentencing of Hughes.

AFFIRMED in part, VACATED in part and REMANDED.

APPENDIX B — RECOMMENDATION AND ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION IN *UNITED STATES v. OSCAR ANDREWS, et al.* DATED AND FILED SEPTEMBER 23, 1994

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

CR. NO. 94-62-N

UNITED STATES OF AMERICA

v.

OSCAR ANDREWS, et al.

RECOMMENDATION OF THE MAGISTRATE JUDGE

On December 3, 1993, the United States applied for and received an order pursuant to 18 U.S.C. §§ 2510, *et. seq.*, authorizing the interception of telephone calls to or from a residence owned by defendant Oscar Andrews. The intercept authorization was renewed on January 4, 1994. On February 8, 1994, authorization to intercept telephone calls was granted with respect to Mary Mitchell's residence located in Castleberry, Alabama. It is undisputed that the January 4, 1994, and the February 8, 1994, applications were based on the original December 3, 1993, application and information obtained through interceptions resulting from the original application. For several reasons, the defendants contend that the government's interception of these telephone communications was unlawful even though obtained pursuant to an order of this court. Upon consideration of the motions to

suppress filed by the defendants, the court concludes that the motions are due to be denied. The court will address each of issues raised by the defendants.

I. THE NECESSITY REQUIREMENT

The original application for authorization to intercept telephone communications was supported by an 84 page affidavit of a special agent of the Drug Enforcement Administration (DEA). Pursuant to 18 U.S.C. § 2518(l)(c), an application for an order authorizing interception of telephone communications must include (1) a full and complete statement as to whether other investigative procedures have been tried and failed; or (2) why these procedures reasonably appear to be unlikely to succeed if tried; or (3) why these procedures reasonably appear to be too dangerous. The statutory "necessity" requirement insures that interception of communications is not "routinely employed as the initial step in criminal investigation." *United States v. Giordano*, 416 U.S. 505, 515 (1974). The statutory requirement further insures that interceptions are not "resorted to in situations where traditional techniques would suffice to expose the crime." *United States v. Kahn*, 415 U.S. 143, 153 n. 12 (1974).

The affidavit of the DEA agent commencing at page 74 sets forth the necessity for electronic surveillance. The affidavit recites as follows:

> In view of the manner in which violations in this investigation are carried out, the interception of wire communications appears to be the only investigative technique having a reasonable likelihood of obtaining the evidence necessary to prosecute

violations alleged in paragraphs 3(a) through 3(d) of this affidavit.

The statutory violations referred to are (1) distribution and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and conspiracy to distribute and possess with intent to distribute cocaine in violation of 21 U.S.C. § 846; (2) the use of a telephone to facilitate violations of controlled substance statutes, 21 U.S.C. § 843(b); (3) the operation by Oscar Andrews and others as a principal administrator, organizer, or leader of a continuing criminal enterprise in violation of 21 U.S.C. § 848(b)(1); and (4) violations of 18 U.S.C. § 1956(a)(1).

The defendants' motions assert that interception of telephonic communications was unlawful because other normal investigative techniques had been and were being employed successfully to undercover statutory violations alleged in the indictment. In support of this argument, the defendants set forth with respect to each of the counts of the indictment the facts related to that count. With respect to Count I of the indictment, the conspiracy count, the defendants additionally discuss each of the facts relating to the overt acts alleged in support of Count I. The defendants point out that not "until Count XXII does the indictment allege events which postdate the wiretap." And, with respect to counts relating to events occurring after the intercept authorization, the defendants assert that it is "more than likely" the United States will present eyewitness testimony which was obtained without regard to the intercept authorizations.

The defendants further assert that the affidavit filed in support of the application for interception of electronic communications sets forth in detail information which the

government has gleaned through the use of confidential informants, pen registers, and trap and trace devices.

> From the very beginning of the affidavit, it is clear that the United States government had identified what it alleges to be the head of the organization, Oscar Andrews, as well as the method by which Mr. Andrews obtained the cocaine which was allegedly distributed through his organization.

Oscar Andrews' June 13, 1994, motion to suppress at 20-21.

The defendants' motion further recounts the nature of evidence not only obtained from confidential informants but also information from a "concerned citizen" who provided information linking shipments of seafood by Oscar Andrews with the distribution of cocaine. The defendants' motion also relates information which apparently was obtained by surveillance of various defendants involved in this case. Defendants argue that each of the confidential informants is in a position to present damaging testimony with respect to criminal activity of the defendants. At base, the defendants argue that the government had so much information about their criminal activity that there was not and could not have been a "necessity" for interception of telephone communications.

Unquestionably, the defendants' motion sets forth with remarkable specificity the long history of criminal activity on the part of the defendants. Nonetheless, the court concludes that the affidavit filed in support of the application for interception of communications more than adequately demonstrates the necessity for interception authorization. The affidavit specifies that seven of the confidential informants were

"not close enough to the organization to enable them to be privy to information identifying all of the individuals involved in narcotics trafficking, all criminal acts of the individuals, the roles of co-conspirators in sufficient detail for prosecution, and all illegal assets controlled by the individuals involved." Comparison of other statements contained in the affidavit supports this assertion. While the affidavit details numerous violations of law, the facts related to those violations do not establish the full extent and scope of the alleged conspiracy. Moreover, the instances of criminal activity do not show the extent and nature of the criminal enterprise such that the organizers of the enterprise clearly may be identified. Furthermore, the affidavit points out that the other confidential informant could not develop any further information because he recently was arrested.

The affidavit further asserts that infiltration by undercover agents into the organization would not lead to information fully identifying all members or activities of the organization because only long standing members of the organization would be trusted, only high ranking members of the organization would have complete access to all information about the organization, and information received from an undercover agent necessarily is limited to "activities immediately transacted with members of the enterprise and . . . [not] other activities involving the criminal enterprise." Affidavit at 76. The affidavit further describes how surveillance "rarely succeeds in gathering evidence of the criminal activities under investigation." Affidavit at 78. The affidavit discusses other possible types of investigative activities and why those activities reasonably will not lead to information relating to all of the defendants' criminal activity.

After careful review, the court concludes that the affidavit fully meets the necessity requirement of 18 U.S.C. § 2518(i)(c). The statute does not require that an affidavit provide "a comprehensive exhaustion of all possible techniques, but must simply explain the retroactive or prospective failure of several investigative techniques that reasonably suggest themselves." *United States v. Van Horn*, 789 F.2d 1492, 1496 (11th Cir. 1986). The affidavit filed in this case in support of the application more than satisfies this statutory requirement.

In *United States v. Nixon*, 918 F.2d 895 (11th Cir. 1990), defendants mounted an argument similar to the one presented here.

> Defendants assert that the government had already obtained through less intrusive investigative techniques sufficient evidence to prosecute and convict those involved in the drug conspiracy. What amount of evidence will be sufficient to obtain a conviction is an imprecise concept. But upon a review of the record we cannot say . . . (the court) erred in concluding that alternative investigative techniques neither had succeeded, nor would succeed in providing enough evidence to prove the conspirators' guilt beyond a reasonable doubt.

United States v. Nixon, 918 F.2d at 901.

What the defendants in this case overlook is that while the government clearly had ample evidence to charge the defendants with certain types of crime, the government did not possess full information about the nature, scope and extent of the conspiracy and the continuing criminal enterprise. "[G]iven

the aim of the investigation to identify the organized crime members who control . . . (the) enterprise . . . electronic surveillance offered the only possibility of success." *United States v. Messersmith,* 692 F.2d 1315, 1,318 (11th Cir. 1982).[1]

In sum, the court concludes that the affidavit filed in support of the application for interception of wire and oral communications amply meets the necessity requirement of the statute. The affidavit fully informs the court about why an intercept is required and establishes that the intercept is required to fully investigate the alleged conspiracy and the continuing criminal enterprise. The motion to suppress on this ground is due to be denied.

II. THE MINIMIZATION REQUIREMENT

Several defendants assert that evidence derived from the telephone intercepts must be suppressed because the surveillance was violative of 18 U.S.C. 5 2518(5). Under this section of the statute, electronic surveillance must be "conducted in such a way as to minimize the interception of communications not otherwise subject to interception." In *Scott v. United States,* 436 U.S. 128 (1978), the Court held that in determining whether the government meets the minimization requirement, a court must make an objective assessment of the actions of the monitoring agents in light of the facts and circumstances confronting them at the time of monitoring. "[T]he statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception

1. In *United States v. Messersmith,* 692 F.2d 1315, 1317 (11th Cir. 1982), the court also observed that the cooperation of an informant does not negate the need for electronic surveillance.

of such conversations." *Id.* at 140. *See also United States v. Moody*, 977 F.2d 1425 (11th Cir. 1992).

Obviously, the inquiry which a court must make to determine whether the minimization requirement is met is a fact bound inquiry. On July 20, 1994, the court commenced three days of hearings on the various motions filed in this case. At the hearing, the following colloquy occurred:

> MR. TESCHNER: Specifically, though, your Honor, as far as evidence goes, we have a witness available, because they claim we had failed to minimize properly in the wiretap. And I don't know, I would expect they would have to go forward with some sort of evidentiary hearing on that.
>
> THE COURT: Well, do you wish to present any evidence on minimization? Mr. Teschner is correct, your motion does make that a basis.
>
> MR. ROSEN: Can we take it up in the morning? I don't think we're going to waste your time. But I just want to make sure we do it, since there is three lawyers involved, that we have enough time —
>
> THE COURT: I'll allow you to discuss it. Obviously if you present no evidence on it, it seems to me, given the nature of the motion, it would be due to be overruled on that basis.
>
> MR. ROSEN: Correct.

The defendants chose not to present any evidence concerning this issue. In the absence of evidence supporting the defendants' arguments, the court concludes that their notions on the ground of failure to minimize should be denied.

III. THE SEALING REQUIREMENT

18 U.S.C. § 2518(8)(a) requires that the recording of intercepted communications "be done in such a way as will protect a recording from editing or other alterations. . . ." The statute further provides that immediately upon the expiration of the intercept authorization, the recordings are to be made available to the judge who authorized the intercept and "sealed under his directions. . . ." In motions filed on or about June 13, 1994, several defendants argue that suppression of the recordings is required for the government's failure to comply with the requirements of the statutory mandate. "The discovery provided today reveals no compliance with the statute. Alternatively, the defendant requests an evidentiary hearing wherein the government is required to meet its burden of compliance." Thus, at the time the motions to suppress were filed, it is apparent to the court that the defendants were unaware whether the government had complied with the sealing requirement. In its response to the motions to suppress, the government points to a March 2, 1994, order of this court, signed by the district judge who initially authorized the intercepts, which seals 386 cassette tape recordings of wire and oral communications intercepted between December 7, 1993, and February 16, 1994. It appears to the court that the order complies with the requirements of the statute. At the evidentiary hearing which commenced on July 20, 1994, the defendants offered no evidence in support of their argument. The motion to suppress for failure to meet the sealing requirement should be denied.

Appendix B

IV. PROBABLE CAUSE

The last issue raised by the defendants is a claim that the affidavit filed in support of the authorization for interception of telephonic communications lacked probable cause. The basis of this challenge is simply set forth in the motions filed by the defendants.

> The defendant files as an addendum to his motion to suppress the 6-page affidavit of W. Marshall Simmons, dated October 6, 1992, entitled "In The Matter of Application Of The United States of America For An Order Authorizing The Interception of Electronic Communications", a copy of which is attached hereto. The absence of probable cause is evident from the face of the affidavit. The results of the pager interceptions form the basis of the subsequent interceptions. Because the pager interceptions were effected without probable cause, the resulting interceptions must be suppressed.

As noted in a separate Recommendation of the Magistrate Judge, at the hearings held on the motions in this case, the United States conceded that the application for authorization to utilize a clone paging device did not establish the requisite probable cause. On that ground, the Magistrate Judge recommended that Curtis Drayton's motion to suppress evidence derived from the utilization of the clone pager be denied. However, the Magistrate Judge further found that the remaining defendants did not have standing to challenge the utilization of the clone paging device. On this ground alone, the court concludes that the motion to suppress for lack of probable cause can be denied.

Appendix B

However, the court independently concludes that the motion to suppress is due to be denied because the affidavit filed in support of the application for the intercept of telephonic communications established ample probable cause without reference to any evidence derived from the use of the clone pager. Thus, even if information derived from the clone pager were redacted from the affidavit, the affidavit still established ample probable cause for authorization for the telephone intercepts.

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that the motions to suppress evidence resulting from the interception of telephonic communications be denied.

Done this 23rd day of September, 1994.

s/ Charles S. Coody
CHARLES S. COODY
UNITED STATES MAGISTRATE JUDGE

Appendix B

CRIMINAL NO. 94-62-N

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright,* 677 F.2d 404 (5th Cir. 1982). *See Reynolds Securities, Inc.,* 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981, *en banc),* adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 23rd day of September, 1994.

s/ Charles S. Coody
CHARLES S. COODY
UNITED STATES MAGISTRATE JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING IN *UNITED STATES OF AMERICA v. MARY MORROW, FRANK SOWERS, et al.* DATED AND FILED OCTOBER 14, 1998

IN THE UNITED STATES COURT OF FOR THE ELEVENTH CIRCUIT

No. 95-6423

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARY MORROW, FRANK SOWERS, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19_, __ F.2d __).

Before: DUBINA and MARCUS, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

Appendix C

(Rule 35, Federal, Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible] Dubina
UNITED STATES CIRCUIT JUDGE